

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**FEDERAL DEPOSIT INSURANCE
CORPORATION, as Receiver of Heritage
Community Bank,**

Plaintiff,

v.

**JOHN M. SAPHIR; PATRICK G. FANNING;
Pallmeyer
STEPHEN L. FAYDASH; WILLIAM E.
HETLER; THOMAS JELINEK; LORI A.
MOSELEY; STEPHEN ANTHONY;
JERRY C. BRUCER; JAMES K. CHAMPION;
ANDREW B. NATHAN; and MARY C. MILLS,**

Defendants.

Case No. 10-cv-7009

JURY DEMANDED

Judge Rebecca

**DEFENDANT JOHN M. SAPHIR'S
MOTION TO DISMISS THE FDIC'S COMPLAINT**

Pursuant to Federal Rule of Civil Procedures 8 and 12(b)(6), defendant John M. Saphir respectfully moves to dismiss the FDIC's Complaint for failure to state a claim. The grounds supporting this motion are set forth below and in the accompanying memorandum.

1. The FDIC purports to allege claims for gross negligence (Counts I and IV), negligence (Counts II and V) and breach of fiduciary duty (Counts III and VI) against former directors and officers of Heritage Community Bank, including the former CEO and Chairman, John M. Saphir, who lost all of his shares of stock in Heritage upon its failure.

2. The fiduciary duty and negligence claims against the Director Defendants (Counts II and III), including Saphir, should be dismissed because they are barred by § 39 of the Illinois banking Act and Article X of the Heritage By-Laws.

3. The gross negligence claims in Counts I and IV should be dismissed because the allegations of the Complaint fail to support a plausible inference that the Director Defendants' conduct was an extreme departure from due care.

4. Neither the common law negligence (Counts II and V) nor breach of fiduciary duty claims (Counts III and VI) support a plausible inference of actionable conduct.

5. The negligence and breach of fiduciary duty claims are also duplicative and Counts II and V should be dismissed for that independent reason.

6. None of the FDIC's claims against Defendants is pled sufficiently to overcome the business judgment rule.

7. The FDIC assumed control over Heritage Community Bank and all of its books and records when it became Receiver upon the closing of Heritage on February 27, 2009. The FDIC conducted an eighteen-month-long administrative investigation, issuing subpoenas and taking depositions pursuant to a formal order of investigation. Nonetheless, the FDIC is unable to plead sufficient facts that set forth a plausible inference of liability against Defendant Saphir and others pursuant to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Accordingly, Defendant Saphir respectfully requests that the Complaint be dismissed with prejudice.

January 24, 2011

Respectfully submitted,

/s/ John M. George, Jr.

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